BRIEF FOR APPELLEE

United States Circuit Court of Appeals

Ninth Circuit

14

No. 5136

A. T. HAMMONS, SUPERINTENDENT OF BANKS FOR THE STATE OF ARIZONA, AND J. S. DODSON, SPECIAL DEPUTY SUPERINTENDENT OF BANKS FOR THE STATE OF ARIZONA,

APPELLANTS

Vs.

MARYLAND CASUALTY COMPANY, a Corporation,

APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA.

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Statement of Facts

The Maryland Casualty Company, a corporation under and by virtue of the laws of the State of Maryland, brought suit in June, 1925, against A. T. Hammons, Superintendent of Banks, J. S. Dodson, Special Deputy Superintendent of Banks in charge of the Bank of Winslow, an insolvent banking corporation, and George J. Schaeffer, Treasurer of Navajo County, and Navajo County, a public corporation by virtue of the laws of the State of Arizona.

It appears from the complaint (Tr. 2-17) that plaintiff corporation was surety upon four bonds, securing the County of Navajo against loss on funds of the County, deposited in the Bank of Winslow, of Winslow, Arizona. The bonds are attached to the complaint as Exhibits A, B, C and D, and in the aggregate amount to $40,000.

The Bank of Winslow, the principal in the said bonds, became insolvent and closed its doors on the fourth day of October, 1924. At that time there were funds of the County of Navajo on deposit in the bank in the aggregate sum of $52,164.20. This deposit was covered by the four bonds of the plaintiff as above described, and by thirty-five Town of Winslow Improvement Bonds, worth the sum of $12,519.61, and Navajo County registered warrants in the aggregate sum of $7,379.30, which indemnity equaled the total amount of $59,899.01. The defendant Dodson was placed in charge of the insolvent institution by the defendant A. T. Hammons, Superintendent of Banks, under the laws of Arizona. At the date when the Bank closed it was the owner of registered warrants issued by Navajo County in the sum of $23,691.60.

It appears from the complaint (Tr. p. 9) that after the Bank of Winslow closed and the defendant Dodson took possession of its assets, he made demand upon the defendant Schaeffer for the return of bonds of the own of Winslow of the par value of $7,000, which were then held by the said Schaeffer as a part of the pledge above enumerated to secure the County deposit in said Bank, and the said Schaeffer, without any authority and in violation of the rights of the plaintiff in the said pledge, returned the said bonds to said Dodson, who then pretended to hold the said bonds free from the pledge to the County of Navajo, and, as is alleged in the complaint, then threatened and intended to use this pledge for the benefit of the

general creditors of the trust estate. The balance of the Town of Winslow Improvement Bonds amounting to about $5,500, had been reduced to cash and the proceeds applied to the reduction of the debt due Navajo County, by the defendant Schaeffer, County Treasurer. It also appeared that Schaeffer had proceeded in the same manner to reduce the County Warrants pledged as security to the County, to cash, and had applied them or the proceeds thereof in reduction of the debt, so that at the time of the filing of the suit, the total debt had been reduced to $37,752.44.

As regards the title to the registered warrants which the Bank owned at the time it closed its doors, it appeared that the Bank of Winslow had pledged, prior to its insolvency, to the Treasurer of Apache County to secure deposits of that County in the Bank, registered warrants of Navajo County in the total sum of $8,110.38; and it was claimed by the plaintiff that this pledge was in violation of the laws of the State of Arizona, and that the County of Apache should return the said warrants to the Bank of Winslow, or Dodson as deputy of the Superintendent of Banks, in charge thereof.

The plaintiff sets out the disposition of the total number of registered warrants owned by the Bank prior to its insolvency (Tr. p. 13). From this statement it appears that there were in the possession of the Special Deputy Superintendent of Banks Dodson, registered warrants of Navajo County in the sum of $11,213.44, registered warrants of said County pledged by the Bank of Winslow to Apache County, in the aggregate sum of $8,110.38, and warrants in transit in the aggregate sum of $5,012.86.

The complainant in the lower court then proceeds to state its cause of action, and the complaint recites that

due demand was made of Dodson, in charge of the Bank of Winslow, to allow offsets in the sum total of the registered warrants in his possession, and that he failed and refused to do so, and in fact threatened to sell and transfer the said warrants and to thereby destroy the offset; that said Dodson also refused to turn over the bonds of the Improvement District of the Town of Winslow of which he had obtained possession by virtue of his demand upon Schaeffer as above recited, and that he threatened to sell the same and thereby deprive the complainant of this credit, which it could obtain, if the bonds were in the possession of Schaeffer, by subrogation after it had paid whatever sum was due the County after the offsets had been determined and allowed.

The prayer was for decree against Hammons, Dodson, Schaeffer, and the County, for the allowance of the offsets and credits as disclosed by the complaint.

The defendant Hammons, Superintendent of Banks, and the defendant Dodson, Special Deputy in charge of the Bank of Winslow, filed a motion to dismiss the complaint, on the ground that the Federal Court had no jurisdiction of the matters set out in the bill, for the reason that the matters therein set forth were subject to the jurisdiction of the Superior Court of the State of Arizona in and for the County of Navajo, under the laws of the State of Arizona (Tr. pp. 38, 39).

Thereafter Hammons and Dodson filed their answers, consisting generally of a justification of the refusal of Dodson to allow the offsets claimed by the complainant, and of his action in requiring Schaeffer, after the Bank had closed, to return the bonds pledged to him as Treasurer of Navajo County to secure the funds of that County in the Bank of Winslow. Schaeffer and Nava-

jo County also filed motions and answers which are not in the record here.

On application for a preliminary injunction, the Court heard the motion to dismiss the bill of complaint and overruled it and granted a temporary injunction to the complainant.

Thereafter the proceedings went to trial upon the issues and the case was tried on the 7th day of January, 1926, at Phoenix, before Federal Judge Jacobs.

At that time a stipulation was entered into between the parties, whereby it was admitted that the allegations of paragraphs 2 and 3 of the bill of complaint were true, and that at the date of the suspension of the Bank of Winslow there was on deposit to the credit of Navajo County in that bank the sum of $51,209.75, of which $15,000 was inactive funds and the rest of the deposit constituted active funds of said County; that paragraph 5 of the bill of complaint was correct, and that at the time of the suspension of the Bank of Winslow the defendant Hammons, as Superintendent of Banks and by virtue of his office in possession of the Bank and its securities, came into possession of registered warrants of Navajo County in the amount of $10,922.44, and that on the date of the failure of the Bank there was in the possession of the defendant Schaeffer as County Treasurer of Navajo County $7,379.40 of registered warrants of Navajo County, pledged as security for the County funds on deposit in the said Bank; that at the date the Bank of Winslow closed its doors to-wit, October 4, 1924, the defendant Schaeffer, County Treasurer, was in possession of improvement bonds of the Town of Winslow in the aggregate amount of $12,519.60, and that on October 23, 1924, he returned $7,000 of these bnods to the defendant Dodson, then in charge of said Bank of Winslow, at the re-

quest of said Dodson, and that said Schaeffer converted the rest of said bonds into cash, and also liquidated the registered warrants pledged as aforesaid, and applied the proceeds of the said bonds and said registered warrants in reduction of the debt of the Bank to the County (Tr. pp. 73-75).

The County Treasurer, defendant Schaeffer, was placed on the witness stand by complainant and the registered county warrants were identified by him as they were produced by the defendant Hammons, Superintendent of Banks. The list of the warrants so identified, and a sample of each warrant, is shown in the record, on pages 181 to 213, inclusive.

In view of the stipulation it was not necessary to prove the facts as to the bonds of the Improvement District, and the State Superintendent of Banks admitted that he had possession of the bonds returned by Schaeffer to Dodson as above stated (Tr. pp. 140, 153).

Upon the proof presented in the lower court a decree was entered allowing to the complainant offsets on account of registered warrants, owned and possessed by the Bank when it closed, in the following sums:

General School District Warrants, and Manual Training School Warrants	$6,313.38
Salary Fund Warrants, aggregating	2,311.04
Road Fund Warrants, aggregating	792.95
Making a total of	$9,417.37

Interest was allowed on the foregoing from their respective dates to the 4th day of October, 1924, the date when the Bank closed. After allowing the offset, the Court in effect held that the amount due from the Bank of Winslow to the County of Navajo would equal the net

sum remaining, when such deduction was made from $37,-752.44, which last named sum was what remained of the original indebtedness of the Bank to Navajo County after the County Treasurer had liquidated the Improvement Bonds remaining in his possession and the registered School Warrants pledged as security. The Court did not attempt to determine the net amount, but the balance can be ascertained by reckoning the interest on each warrant to October 4, 1924, and adding this interest so obtained to the principal of each warrant, then getting the aggregate of all the warrants, and deducting that aggregate from $37,752.44, the interest, of course, being computed from the date of registration of each warrant.

The court then held that Schaeffer could not legally return the Town Improvement Bonds to Hammons or his representative Dodson, after the Bank had closed, and held further that upon the payment of the balance due after the offset had been deducted as above stated, the complainant would be subrogated to the right of the County to those bonds, and that Hammons should return them to the County, which in turn should turn them over to the plaintiff upon the discharge of the balance due.

It was further adjudged that the complainant, upon the payment of the amount due, should be decreed to be a general creditor of the Bank of Winslow, and should be entitled to all the rights, dividends and payments which had then been made or should be made in the future to other general creditors of the Bank of Winslow, and that the defendant Hammons, as Superintendent of Banks, in charge of the liquidation of said Bank of Winslow, should pay such dividends to the complainant.

The Court also held that the Navajo County Warrants pledged to Apache County, was a lawful pledge and

could not be claimed as an offset by the complainant (Tr. pp. 216-222).

From this decree the defendants Hammons and Dodson took an appeal under the Act of Congress dated February 13, 1911, and under Rule 23 of the Circuit Court of Appeals of the Ninth Circuit, assigning errors as appearing on pages 223 and 239 of the Transcript. The decree was entered April 19, 1926, and the appeal and assignment of errors, and the order allowing appeal, were filed and entered on June 26, 1926.

The assignments of error one, two and three are to the effect that the Court had no jurisdiction of the matters submitted by the bill of complaint, because the matter of the liquidation of the Bank was in the Superior Court of the State of Arizona in and for the County of Navajo, on the date when the case was filed in the Federal Court.

Assignments Nos. 4, 5, 6, 7, 8 and 9, are all addressed to the allowance of the offset of the registered warrants.

Included in the Transcript (pp. 239 to 256) are extracts from a newspaper of August 1, 1924, the relevancy of which is not apparent. These pages are not exhibits and certainly could not be injected into the record as proof of anything. We do not understand upon what theory they appear in the record as a part of it.

The return day of the citation on appeal is the 11th day of August, 1926 (Tr. p. 257). There was no extension of time granted within this return day, the first order attempting to enlarge the time appearing to have been entered on the 16th day of September, 1926 (Tr. p. 261). This order enlarged the time, or attempted to do so, to the 1st day of November, 1926, and the next one enlarged it thirty days from the 1st day of November, 1926, but

bears no date (Tr. pp. 261-2) so that it cannot be told whether it was in time or not. The next order was entered on the 1st day of December, 1926, which would not have been within the time, because thirty days from November 1st would have expired at midnight November 30th, 1926. The next extension time was granted December 1st, 1926, until, and including the 20th day of December, 1926, and the next order was apparently entered January 13, 1927, long after the date in the preceding order had expired, and extended the time to February 1st, 1927. The succeeding orders do not seem to have been in time, and we especially refer to the order appearing at the bottom of page 263 and top of page 264, which gave thirty days from the 31st day of January, the next order having been entered the 2nd day of March, 1927, and giving thirty days from and after said date. The next order was entered March 31st, 1927, and gave thirty days from that date, but as a matter of fact the record was not filed until May 2nd, 1927, which fell outside of the time within which the record could have been filed.

It should be pointed out that no praecipe was filed for the appellants in this cause (Tr. 266), and it is apparent that the first bill of complaint and the answers of the defendants Schaeffer and the County of Navajo have been omitted from the record. The answer of said defendants to the amended bill was twenty-one pages long and was signed by the County Attorney, the Attorney General and W. E. Ryan, special counsel. In view of failure of appellants to file a praecipe this omission becomes material as will hereafter be shown.

POINT I

THE APPEAL SHOULD BE DISMISSED

It is the general rule in the United States Circuit Court of Appeals that all parties having interest in the cause and affected by the decree should join in the appeal. Kidder v. Fidelity Ins. Trust & S. D. Co. 44 C. C. A. 593, 105 Fed. 821; Loveless v. Ransom, 46 C. C. A. 515, 107 Fed. 627 and cases cited; Simpson v. Greeley, 20 Wall. 158, 22 L. ed. 339; Sipperley v. Smith, 155 U. S. 86, 39 L. ed. 79, 15 Sup. Ct. Rep. 15; Davis v. Mercantile Trust Co. 152 U. S. 593, 38 L. ed. 564, 14 Sup. Ct. Rep. 693; Wilson v. Kiesel, 164 U. S. 252, 41 L. ed. 423, 17 Sup. Ct. Rep. 124; St. Louis United Elevator Co. v. Nichols, 34 C. C. A. 90, 91 Fed. 833; Dodson v. Fletcher, 24 C. C. A. 69, 49 U. S. App. 61, 78 Fed. 214; Hedges v. Seibert Cylinder Oil Cup Co. 1 C. C. A. 594, 3 U. S. App. 25, 50 Fed. 643; Aiken v. Smith, 4 C. C. A. 654, 2 U. S. App. 618, 54 Fed. 896; Humes v. Third Nat. Bank, 4 C. C. A. 668, 13 U. S. App. 86, 54 Fed. 917; Hardee v. Wilson, 146 U. S. 180, 36 L. ed. 933, 13 Sup. Ct. Rep. 39; Fordyce v. Trigg, 175 U. S. 723, 44 L. ed. 337, 20 Sup. Ct. Rep. 1024.

The defendants in this case (Tr. 2) were A. T. Hammons, Superintendent of Banks of the State of Arizona, J. S. Dodson, Special Deputy Superintendent in charge of the Bank of Winslow and its assets, George J. Schaeffer, Treasurer of Navajo County, and Navajo County, a quasi public corporation organized and existing under and by virtue of the laws of the State of Arizona with power to sue and be sued. The prayer (Tr. 16) asked that the said defendants immediately list the credits and offsets due the county as they existed on the 4th day of October, 1924, between the County and the Bank of Wins-

low, the said date being the date when the bank closed, and that the amount due the County from the Bank in the hands of the State Superintendent of Banks and his deputy be satisfied and discharged to the extent of the warrants, both registered and unregistered, owned on the 4th day of October, 1924, by the Bank of Winslow, and also to the extent of the value of the Improvement Bonds of the town of Winslow held by the County Treasurer, the defendant Schaeffer, on that date. The decree (Tr. 216), a joint judgment against the defendants Hammons, Schaeffer,and Navajo County, found that the sum of money due the County was thirty-seven thousand seven hundred fifty-two and 44-100 dollars ($37,752.44), and that the complainant should have as offsets against the County, the warrants listed in the sum of nine thousand four hundred seventeen and 37-100 dollars ($9,417.37), and that defendant, Navajo County, and the defendant, Hammons, and the defendant Schaeffer as County Treasurer, carry out the terms of the decree so that the offset should become effective. The decree then provides that the complainant shall pay the defendant Schaeffer the balance due after the offset is allowed, and that the defendant Schaeffer shall turn over the Town of Winslow Improvement Bonds which he returned to the defendant Dodson after the bank closed so that if the complainant paid the balance due after the offset was allowed, it could be subrogated to the right of the County to these bonds and should have possession of the same.

It is evident that the finality of that decree against all the defendants can only be determined in an appeal to which defendant Schaeffer and defendant Navajo County were parties. There is no averment in the record, nor any showing of a summons and severance as to the said defendants. Certainly the decree against the several de-

fendants is joint in substance. It deals with the interests of the several defendants in one subject matter, to-wit, the right of the complainant in the lower court to an offset and to be subrogated to the bonds returned by Schaeffer to Dodson after the closing of the bank. The record fails to show that the defendant Schaeffer and the defendant Navajo County filed a twenty-one page answer to the first amended bill of the complainant, which amended bill is the one appearing in the record to which reference has already been made frequently. The record fails to disclose that this answer to the amended bill called upon the plaintiff to pay into court the "just and full sum of forty thousand dollars with interest thereon at the rate of six per cent per annum from October 4th, 1924, for the use and benefit of the defendant corporation, that the bill of complaint be dismissed as to both of these answering defendants". This omission from the record will be discussed later in the point raised as to the failure to file and serve a praecipe in this appeal.

It is the law that the omission of the defendants against whom a joint judgment has been entered from an appeal is jurisdictional unless there has been a summons and severance. Continental and Commercial Trust and Savings Bank et al. v. Corey Brothers Construction Co. et al. (C. C. A. 9th Circuit) 205 Fed. 282; Ibbs v. Archer, 185 Fed. 37 (C. C. A. 3rd Circuit); Loveless v. Ransom, 46 C. C. A. 515, 107 Fed. 626; Hook v. Mercantile Trust Co. 36 C. C. A. 645, 95 Fed. 41-49; Kidder v. Fidelity Ins. Trust & S. D. Co. 44 C. C. A. 593. 105 Fed. 821; Ayres v. Polsdorfer, 45 C. C. A. 24, 105 Fed. 737; Dolan v. Jennings, 139 U. S. 387, 35 L. ed. 217, 11 Sup. Ct. Rep. 584; Estes v. Trabue, 128 U. S. 230, 32 L. ed. 437, 9 Sup. Ct. Rep. 58; Hanrick v. Patrick, 119 U. S. 163. 30 L. ed. 402, 7 Sup. Ct. Rep. 147. The Columbia, 15 C. C. A. 91, 29 U.

S. App. 647, 67 Fed. 942; Fitzpatrick v. Graham, 56 C. C. A. 95, 119 Fed. 353; Hedges v. Seivert Cylinder Oil Cup Co. 1 C. C. A. 594, 3 U. S. App. 25, 50 Fed. 643.

There has been no summons or severance in this case. The record discloses that the appellants, Hammons and Dodson made no application to the Judge in the lower court for a severance, and no request upon the defendants Schaeffer and Navajo County for them to join in the appeal. Without such showing there is no jurisdiction in this court of the appeal. Faulkner v. Hutchins, 61 C. C. A. 425, 126 Fed. 362; Copland v. Waldron, 66 C. C. A. 271, 133 Fed. 217; Provident Life & Trust Co. v. Camden & T. R. Co. 101 C. C. A. 68, 177 Fed. 854; Detroit v. Guaranty Trust Co. 93 C. C. A. 604, 168 Fed. 610; Inglehart v. Stansbury, 151 U. S. 68, 38 L. ed. 76, 14 Sup. Ct. Rep. 237; Beardsley v. Arkansas & L. R. Co. 158 U. S. 123, 39 L. ed. 919, 15 Sup. Ct. Rep. 786.

Objection may be made at any time since the matter is jurisdictional. Loveless v. Ransom, 46 C. C. A. 515, 107 Fed. 626; Ayres v. Polsdorfer, 45 C. C. A. 24, 105 Fed. 737.

Under the foregoing authorities this appeal should be dismissed.

No praecipe for record was filed, and there is no proof that appellants pursued the requirements of Equity Rule Seventy-five (226 U. S. 671). The answers of the defendant Schaeffer and the defendant Navajo County, are not included in the record. Those answers are material portions of the record in that they disclose the defense of those defendants to be substantially that of defendants Hammons and Dodson and that Schaeffer and Navajo County are jointly defendants with them making common cause against the plaintiff. The appeal should be dismissed. Wade et al. v. Leach, 2 F. (2nd) 367.

The transcript was not filed in time. The last extension granted was thirty days from and after March 31st, 1927 (Tr. 265), and the record was filed on May 2nd, 1927,—two days too late (Tr. 267). There is nothing to show that the orders extending the time (Tr. 261 to 265), were ever filed with the Clerk of this Court. Chamberlain Transportation Co. v. South Pier Coal Co. 126 Fed. 165; In re Alden Electric Co. 123 Fed. 425.

The certificate of the clerk of the lower court (Tr. 213) is insufficient. He does not certify that the transcript is complete. Ruby v. Atkinson, 93 Fed. 577; Meyer v. Mansur Implement Co. 85 Fed. 874, 875; Farmers' Loan and Trust Co. v. Eaton, 114 Fed. 14.

The certificate does not show that there was any stipulation of counsel, or that the clerk was guided by Equity Rule Seventy-five in preparing the transcript. Burnham v. North Chicago St. Ry. Co. 87 Fed. 168. See also, Cutting v. Tavares 61 Fed. 150. The clerk certifies that he has omitted his endorsements by request of the solicitors for the appellants. It is apparent that those endorsements are as much a portion of the record as the pleadings themselves, and the failure to include them has no basis, so far as we know, in any correct preparation of an appeal. Certainly the appellee did not agree to any such omission which might well be material, especially in connection with the orders entered after the appeal was granted, and especially as to the filing of the alleged statement of the evidence. Thus, there is no proper record before this court. (Tr. 266).

POINT II.

THE LOWER COURT HAD JURISDICTION OF THE CAUSE

The bill in the lower court shows the requisite diversity of citizenship and amount involved to give the United States District Court for the District of Arizona, jurisdiction. The banking code of Arizona appears in the Special Session Laws of 1922. Suits of this character have been sustained in the Federal Courts. Allen Bank Commissioner et al. v. United States, 285 Fed. 678, 683 (C. C. A. 1st Circuit). The laws of Massachusetts upon the subject construed in the above case are substantially those of the State of Arizona. There is a New York statute of a similar character, and the New York courts have consistently held that the superintendent may sue and be sued. In re Carnegie Trust Co. 146 N. Y. S. 809. The same is true in California, Mercantile Trust Co. v. Miller 137 Pac. 913, 916. It is not necessary to obtain leave of court to sue a Receiver of a National Bank appointed by the Comptroller of the Currency. Ex Parte Chetwood, 165 U. S. 443, 41 L. ed. 782. See also, Strain v. U. S. Fidelity & Guaranty Co. 292 Fed. 694; Duke v. Jenks 291 Fed. 282; Fidelity and Deposit Co. v. Duke, 293 Fed. 661. In the case cited and depended upon by counsel for appellants, the decision was by the United States District Court for the Southern District of New York, and the court did not hold that it was necessary to obtain permission of the State Court before bringing the suit against the State Superintendent of Banks. The matter involved was a question of preference and not one of setoff or of an unlawful attempt to acquire property by the State Superintendent of Banks to which he was not entitled as the liquidator of the Bank of Winslow. The case is not in

point. As to all of the other cases cited by counsel, the points involved and decided arose from receivership cases in which either the State or the Federal Court had first taken possession of the trust estate by the appointment of a receiver, and the courts denied the right of any other court than that which had first so taken possession to attempt to take jurisdiction over the *res* in another proceeding. The case at bar is in no respect the same.

The powers of the superior court over the statutory receivership are defined by the laws of the State of Arizona as shown by the excerpt from those laws appearing on page sixteen of appellees' brief. The court does not take into its possession through the receiver the assets of the bank and has no control over them except in cases of sale of the property of the bankrupt bank. The Superintendent of Banks collects the debts due, and for such purposes is authorized to institute, maintain and defend suits irrespective and apart from any authority by or from the Superior Court. Section 48 of the Act requires the claimants to make proof of claims to the Superintendent of Banks with which the court has nothing to do, and the Superintendent of the Banks passes on the justice and validity of the claim, and can reject the same without any order or intervention of any character of the court, and where a claim is rejected the claimant can bring suit upon it six months after the service of notice upon him of such rejection. The statute does not give the Superior Court any supervision over these matters, or any right to intervene in such cases. As a matter of fact, the surety company had no claim to present at the time when the suit was instituted and had only an equitable right to the offsets and to the improvement district bonds by subrogation as such surety, both of which rights had been refused and rejected by the defendants in the case.

It cannot be questioned but that a suit in equity can be maintained by a surety to compel an offset between its principal and its creditor where special circumstances intervene entitling the surety to equitable relief. The rule as laid down in 21 R. C. L., page 1080, is as follows:

> "It is the general rule that a surety, upon showing some special equitable ground, as, for example, the insolvency of his principal, may obtain a setoff in equity."

and the following cases sustain the right to maintain the proceeding, especially where the principal is bankrupt: Scholze v. Steiner (Ala.) 14 So. 552, 553; Perry v. Pye (Mass.) 102 N. E. 653, 657; Mitchell v. Holman (Oregon) 47 Pac. 616; Becker v. Northway, 44 Minn. 61; 20 A. S. R. 543; Downer v. Dana, 17 Vt. 518; Brinson v. Sanders, 54 N. C. 210; Armstrong v. Warner, (Ohio) 31 N. E. 877, 17 L. R. A. 466; Willoughby v. Hall 18 Okla. 555; 90 Pac. 1017; Crutcher v. Trabne, 5 Dana 80. In Scholze v. Steiner, supra, the Court said:

> "Ordinarily, a surety, when sued upon his obligation, cannot avail himself of an independent cause of action existing against the plaintiff in favor of his principal as a defense or counterclaim. It is for the principal to determine what use he will make of such cause of action, and the surety cannot control his discretion. Lasher v. Williamson, 55 N. Y. 619; Morgan v. Smith, 7 Hun. 244. By statute in this state (Code Sec. 2681) it is provided that a co-maker or surety, sued alone, may with the consent of his co-maker or principal, avail himself, by way of set-off, of a debt or liquidated demand due from the plaintiff at the commencement of the suit to such comaker or principal. But this statute by its terms is confined to cases where the surety is sued alone, and

where he has the consent of the principal to avail himself of the set-off, and, consequently, gives no support to the bill in this case. Appellees' right of set-off is independent of the statute, and is referable to the jurisdiction in courts of equity arising in such cases from the insolvency of the principal. The doctrine generally recognized is that, where the principal has a valid claim against the creditor, the surety will not be compelled to pay the claim, and seek a doubtful remedy against the insolvent principal, but, on being sued on his contract, will be allowed in equity to show the insolvency of his principal, and set off the claim against the creditor. Morgan v. Smith, supra; Gillespie v. Torrance, 25 N. Y. 306. According to this rule, the insolvency of Lesser, the principal, furnishes a special ground of equity, giving to the court jurisdiction of the question of set-off presented by the bill, and sufficiently establishes the right of appellees, in equity, to set off pro tanto the judgment of Allen & Taylor against Herman Scholze, which was purchased by Lesser, unless that right is defeated by the prior transfer by Herman Scholze to Robert Scholze of his judgment against Lesser and appellees. Watts v. Sayre,75 Ala. 397, 400."

Passing on the general question, the Court in Becker v. Northway, supra, defined the law as follows:

"The author may here state the rule more broadly than the decided cases will justify; for the interposition of a court of equity to enforce set-offs that would not be allowed at law was based on the condition that otherwise the surety would be without adequate remedy. Bankruptcy or insolvency of the principal debtor presents such a case; for if the surety be, in such case, compelled to pay, and resort to an action against the bankrupt or insolvent principal debtor, he is practically without remedy. So where a

remedy may be afforded him without prejudice to the creditor suing him,—and ordinarily he cannot be prejudiced by setting off a debt he owes the principal against the principal's debt to him, for which, he is suing the surety,—equity will furnish that remedy; Ex parte Hanson, 18 Ves. 232; Cheetham v. Crook, McClel. & Y. 307; Wathen v. Chamberlin, 8 Dana, 164; Gillespie v. Torrance, 25 N. Y. 306; 82 Am. Dec. 355; Hiner v. Newton, 30 Wis. 640.

"We do not mean to intimate that the surety, when sued alone, may, in that action, have the set-off; for a court will if possible, avoid the litigation of a debt when only one of the parties to the debt is before it. The surety might have to bring a separate action against the creditor and principal debtor to enforce the set-off, and, pending that action enjoin the action against him."

In the case of Armstrong v. Warner, supra, the Court held that the allowance of an offset under such circumstances as existed in the instant case is not a preference to the Surety over other creditors of a general character and the language of the Court is instructive:

"This section, as we understand it, does not prohibit the allowance of any vaild set-off, legal or equitable, which a debtor of a bank may have against any obligation owing to it by him at the time of its insolvency. The allowance of such a set-off is not the creation of a preference, but an ascertainment of the just amount due. To exact the payment of more than that would be unjust, and the section, we think, does not require that to be done. Warner's equitable right of set off existing at the time of the failure of the Fidelity Bank, and his obligations, having passed to the Receiver subject to that right, only the balance due on those obligations after deducting the off-sets constituted assets of the bank in the receiver's hands for disposition in accordance with the provisions of

the Federal statutes. Counsel for plaintiff, in error cite the case of Armstrong v. Scott, 36 Fed. Rep. 63, as maintaining a contrary doctrine. But the later cases of Snyders Sons Co. v. Armstrong, 37 Fed. 18, and Yardley v. Clothier, 49 Fed. Rep. 337, after a full review and discussion of many authorities, and a careful consideration of the statutes, decline to follow Armstrong v. Scott. Those decisions are in accord with the views as we have expressed, and render it unnecessary to enlarge the discussion here."

That there is equity in the bill is obvious from the foregoing.

POINT III

UNDER THE SETTLED LAW OF THE STATE OF ARIZONA THE LOWER COURT PROPERLY ALLOWED THE OFF-SETS

The Supreme Court of the State of Arizona has decided that a depositor in an insolvent bank in the hands of the Superintendent of Banks is entitled to set off, against his indebtedness to the bank on a note, the amount of his deposit. Hammons v. Grant, et al. (Ariz.) 225 Pac. 485. It is clear that the salary fund warrants aggregating two thousand three hundred eleven and 4-100 ($2,311.-04) dollars, and the road fund warrants aggregating seven hundred ninety-two and 95-100 dollars ($792.95) are within the case of Jarvis, County Treasurer, vs. Hammons, State Superintendent, 256 Pac. 362, in which the Supreme Court of Arizona was called upon to pass upon the question of an off-set claimed by the county against a defunct bank in the hands of the State Superintendent of Banks for county warrants. It was held that the cri-

terion as to whether such an off-set would lie was whether an action would lie against the county to recover the indebtedness for which the warrants were given as evidence. The record in the case at bar clearly discloses that the lower court was correct in this particular (Tr. 216) and the decision by the Supreme Court of Arizona upon a matter of law under the statutes of the State, is controlling here. On the rehearing of the above case reported page 985, Vol. 257 Pac. Rep., the court reversed its ruling on the matter of school warrants and sustained an off-set on that account. The exhibit page 181 of the Transcript shows that the school warrants were issued as an order upon the Treasurer of the County to pay the payee, and all of these warrants were registered ,thus bringing them within the rule stated in the case on rehearing. All of the school warrants were issued in the same form as the one appearing on page 181 of the Transcript.

In view of the foregoing decision by the Supreme Court of the State of Arizona, the lower court was correct in its findings and decision as regards the off-sets allowed on account of registered warrants (Tr. 216).

POINT IV

THE COMPLAINANT IN THE LOWER COURT WAS ENTITLTD TO BE SUBROGATED TO THE CLAIM OF THE COUNTY IN THE IMPROVEMENT BONDS OF THE TOWN OF WINSLOW UPON PAYMENT OF THE AMOUNT FOUND DUE TO THE COUNTY BY THE DEFUNCT BANK.

On April 23, 1923, Improvements Bonds of the town of Winslow were pledged to the County of Navajo as security for the deposits of the County in the Arizona

State Bank of Winslow as the same are listed in the Transcript, pages 192, 193. After that date there was a merger of the Arizona State Bank with the Bank of Winslow and the assets of the Arizona State Bank were transferred to the Bank of Winslow (Tr. 140). The defendant Dodson testified that he received seven thousand dollars worth of these Improvements Bonds from the defendant Schaeffer after the bank was closed, and that he listed them as assets of the Bank of Winslow (Tr. 153). The defendant Schaeffer testified that he held these Bonds after the merger and that the Bank of Winslow raised no objection as security for the deposits of the Bank of Winslow (Tr. 86). The bonds were pledged jointly with the surety company bonds and the county warrants to secure the deposits of the County in the Bank, and the County Treasurer liquidated the county warrants pledged, and enough of the Improvement Bonds to reduce the liability of the bank to the county from $51,209.75 to $37,752.44, for which there was security surety bonds in the sum of forty thousand dollars, and the balance of the Improvement Bonds amounted to seven thousand dollars, but on October 23, 1924, the County Treasurer returned seven thousand dollars of those bonds to the Assistant Bank Examiner, thereby altering the condition existing at the time the bank closed, to-wit, October 4, 1924, and destroying the right of the surety company to be subrogated to the right of the county to these bonds if and when the surety company paid the loss. The surety company was prepared to pay the loss, but the county having destroyed the right of the surety company to be subrogated to these bonds by returning them to Dodson, it became necessary to enforce that right by proceedings in the lower court to the end that the bonds might be returned to the county or turned over to the surety com-

pany when the loss is paid after the off-sets were allowed. The principle involved is one of subrogation and of course, the surety company was not obligated to pay until the off-sets were properly allowed, which had been refused by the County and the State Superintendent of Banks. In fact, until those off-sets had been allowed, the amount due from the surety company to the county could not be determined. The lower court having determined those questions the amount due was fixed by it and the right of the surety company to become subrogated to the bonds upon the payment of that amount also became fixed by the decree of the lower court. It is elementary that whenever a party discharges an obligation in performance of a legal duty, to-wit, an obligation for the performance of which he was legally bound, where his liability was subsequent to that of another party, his principal, to-wit, in the case at bar the Bank of Winslow, he is entitled to be subrogated to and to have the benefit of all the rights of the creditor to all securities which may at any time have been put into the creditor's hands by the principal debtor. We do not deem it necessary to submit authority upon so elementary a proposition of law. The creditor in this case, Navajo County and the Treasurer thereof, had in its hands when the bank closed the bonds of the Improvement District of the Town of Winslow, and when the bank closed the status of those bonds became fixed and could not thereafter be altered by any act of the creditor whereby the right of the surety to be subrogated to the right of the county in these bonds could be destroyed. It is also elementary that where the creditor destroys by its act this right of subrogation and such rights are released to the prejudice of the surety, the surety is released from its obligation, at least *pro tanto*. We do not understand that appellants deny the foregoing,

and in fact we gather that they admit the law to be as stated. The contention seems to be on the part of the appellants that the surety has not paid and therefore cannot claim any rights of subrogation in the bonds in question. This would be true if it had been possible at any time material to the cause of action in the lower court for the correct amount to have been ascertained in order that the payment could have been made by the plaintiff. Failure in this connection was not attributable to the fault of the plaintiff but to the defendants who refused the off-sets and, thus, it became necessary to file the suit in the lower court to determine just what the plaintiff did owe when the off-sets should be allowed. The decree in the lower court gives no right to the plaintiff in the bonds until the amount is paid, and thus follows the law and does not depart from it, to the effect that until the full amount of the indebtedness as therein found to be due is fully discharged by the plaintiff, it shall not have the benefit of the bonds by subrogation. It is of course, the intent of the plaintiff to pay the judgment and then to claim the bonds by virtue of its subrogated rights to the rights of the county. Since the appeal of the appellants it has been impossible to carry out that portion of the decree. Appellants seem to argue only that as the plaintiff has not paid it cannot be subrogated, and as this is the only point argued, we point to the provision of the decree (Tr. 217, 218) to show that plaintiff can obtain no rights in the bonds until it has paid in full the balance due to the county. Thus, the decree is fully in accord with the law upon the subject and gives the plaintiff no rights which the law does not properly accord to the surety under the circumstances stated and admitted in this case.

CONCLUSION

There appears in the record a series of schedules (Tr. 239 to 257) which apparently have no place there. They do not seem to be exhibits, nor yet are they evidence in any respect so far as the record discloses. We submit that these pages should be disregarded by the court in this appeal.

We submit that in view of the foregoing:

(a) The appeal should be dismissed and the lower court affirmed.

(b) That in any event there is no error in the record and the decree of the lower court should be affirmed.

Respectfully submitted,

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